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# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 75

GWIN, WHITE & PRINCE, INC., Appellant,

v.

HAROLD M. HENNEFORD, THOMAS S. HUNTER and T. M. JEWETT, Constituting the State of Washington Tax Commission, Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

## BRIEF OF APPELLEES


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Attorneys for Appellees.

Temple of Justice, Olympia, Washington.


STATE PRINTING PLANT

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## STATEMENT OF THE CASE

We believe appellant's statement of the case should be somewhat amplified.

In the trial court, appellant was the plaintiff, and appellees, the defendants. To avoid confusion we will

hereafter refer to appellant as "plaintiff," and to appellees as "defendants."

It is alleged in the complaint that plaintiff, a Washington corporation, acting solely as agent for various growers and grower organizations in the states of Washington and Oregon, is in the business of marketing apples and pears produced in Washington and Oregon and in making deliveries of fruit so sold, collecting the sales price and remitting the net balance thereof to said growers and grower organizations.

It is further alleged (Par. IV) that with the exception of occasional sales of small quantities of fruit sometimes made in Washington, all fruit sold by plaintiff is shipped and delivered outside of Washington to non-resident purchasers; (Par. V) that plaintiff has sales representatives at many points outside of Washington, who, on plaintiff's behalf, negotiate said sales and on plaintiff's approval thereof, execute in said points outside of Washington and on plaintiff's behalf, written contracts of sale; that also as part of its business, plaintiff during the fruit season, sends to its said sales representatives daily bulletins listing cars of fruit, some of which are at the time either stored outside of Washington or are already moving in cars in interstate commerce; that in conducting its business and making said sales, plaintiff expends large sums of money in telephone, telegraph and cable communications; that it handles the bills of lading on all shipments made in compliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to plaintiff at extra-state points, and that through its for-

eign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom, which are thereafter forwarded to plaintiff at Seattle, all in the course of interstate and foreign commerce.

It is further alleged (Par. VIII) that the defendant, tax commission, has ruled and asserted that under title II, chapter 180, Laws of 1935, plaintiff is liable for the payment of an occupational tax on the business done by it, measured by plaintiff's gross revenue therefrom, and threatens enforcement, and unless restrained will enforce payment as provided by law, to plaintiff's irreparable harm and injury; (Par. IX) that such enforcement of collection of said tax is a violation of the commerce clause, and constitutes a duty on exports in violation of section 10, article 1 of the federal constitution.

Plaintiff then alleges (Par. X) that it has no plain, speedy or adequate remedy at law, and prays for injunctive relief. (R. 1-4.)

Defendants interposed a general demurrer whereupon the following stipulation was entered into:

"It is stipulated * * * that the court may decide this case on the merits on defendants' demurrer together with additional facts herein stipulated.

"It is further stipulated that plaintiff * * * transacts its entire Washington State business under a written contract with the Wenatchee-Okanogan Cooperative Federation which is an organization representing approximately twelve cooperative growers' organizations in the state of Washington, and that a full, true and correct copy of said contract is hereto attached, marked Exhibit A." (R. 4-5.)

By the contract referred to, the Wenatchee-Okanogan Cooperative Federation, a corporation of Wenat-

chee, Washington (therein referred to as the "Federation") appoints plaintiff (therein referred to as "agency") "its exclusive agent to sell and collect the proceeds from sales of all the federation's commercially packed apples and pears." On its part, the federation agrees, among other things (1) to harvest, clean, grade and pack the fruit; (2) "at such times as directed by agency to deliver products free on board cars;" (3) "to ship all cars to points and consignees designated by said agency," and (4) to guarantee, and if required, to prepay all transportation charges. (R. 6-7.)

Plaintiff's obligations under the contract are briefly these: (1) to sell said products f. o. b. at shipping station in transit or delivered; (2) to effect the widest possible distribution of such products and to cultivate and develop domestic and foreign markets; (3) to use its best efforts to shorten the route between producer and consumer by elimination of waste, avoidance of unnecessary middlemen, and education of legitimate wholesale and retail trade; (4) to keep the federation and its members duly informed of market conditions; (5) to permit inspection of plaintiff's books; (6) under certain circumstances to assume responsibility for collection and payment to federation of sales proceeds, less allowance for reasonable claims, but not bank failures or defaults; (7) to assist the federation in all matters pertaining to transportation services, routings, etc.; (8) to cooperate with federation and other representatives of the industry in efforts to create and maintain equitable transportation rates and services; (9) to provide the facilities of its claim department for prosecution of claims for overcharges, loss, or damage. (R. 7-9.)

The contract then provides generally (1) for the general sales policy; (2) that subject to certain conditions the federation and its members are to have the exclusive right to fix the prices of their products; (3) that on consummation of sales, proceeds are to be deposited in the name of plaintiff as trustee; (4) the federation is to pay cost of distant storage and inspection; (5) as to sales made by plaintiff and confirmed by federation, the latter is to hold plaintiff harmless against all expense or loss suffered by plaintiff either by failure to deliver, live up to specifications, or otherwise effect good delivery; (7) plaintiff is to prosecute all claims against carriers but federation to pay costs thereof; (8) plaintiff is to endeavor to audit carriers' expense bills in all cases where legal liability may attach to federation; (9) plaintiff is to pay for all telegraph or telephone messages between plaintiff and federation; (10) federation is to pay plaintiff same amount per box of fruit whether sold by plaintiff or through other channels.

The compensation for plaintiff's services was fixed at 8 cents a box for apples and 10 cents a box for pears. (R. 9-12.)

The court entered its order sustaining defendants' demurrer to the complaint (R. 14), and thereafter, it having been further stipulated that the state made no claim to a tax on plaintiff's Oregon business, and the plaintiff having elected to stand on its complaint as supplemented by the stipulated facts, the court dismissed the suit. (R. 14.)

On appeal, the judgment of the trial court was affirmed. (R. 28.) *Gwin, White & Prince Inc. v. Henneford*, 193 Wash. 451. Plaintiff has appealed to this court.

## ARGUMENT

**The exaction of the Washington business tax on plaintiff's business activities in Washington does not offend the commerce clause.**

The validity of the offending exaction depends on the state's power to tax businesses conducted within its borders, and the extent to which this power is limited by the commerce clause.

Of course, business transactions totally unconnected with any interstate or foreign transportation, are subject to state taxation. Moreover, even if a given business activity be connected with a prior or subsequent interstate transportation of the subject of the transaction, the commerce clause still does not forbid its non-discriminatory local taxation unless the connection is so close that the exaction of the tax can be said to constitute a direct burden, as distinguished from a remote, indirect or incidental, burden on interstate commerce.

The controlling principles determinative of when a non-discriminatory state gross receipts tax constitutes a forbidden direct burden on interstate commerce, and when a permissive indirect or incidental burden were clearly stated and applied in the recent case of *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, upholding a state tax on the business of publishing newspapers or magazines of interstate distribution measured by 2% of the gross receipts from the sale of advertising including contracts with ultra-state advertisers, which contracts involved interstate transmission of cuts, mats, information, copy, etc., and also payment through interstate facilities. Said the court in part (pp. 253-261):

"Appellants insist here, as they did in the state courts, that the sums earned under the advertising con-

tracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

"That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of congressional action, unless the performance is within its protection, is a proposition no longer open to question. * * * Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. * * * (citing cases). * * * Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

"We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisments. * * *

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' * * * and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce. * * * Net earnings from interstate commerce are subject to income tax, *United States Glue Co. v. Oak Creek*, 247 U. S. 321, * * *.

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * * The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523.

* * * * * * * * *

"In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co. v. St. Louis*, (250 U. S. 459) *supra*, 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen v. Shelby County Taxing Dist.*, (145 U. S. 1) *supra*, sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

"Viewed only as authority, *American Manufacturing Co. v. St. Louis, supra*, would seem decisive of the pres-

ent case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

"As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U. S. 90, 94. * * * Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought.

* * * * * * * *

"But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which

may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."

And compare *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 612.

In the present case, plaintiff can be taxed in no other state by reason of its Washington activities in acting as the federation's sales agent. And likewise, as will be shown later, the activities of plaintiff's ultra-state representatives can be taxed only by the states where such activities occur.

In *Adams Mfg. Co. v. Storen*, 304 U. S. 307, it was held that the Indiana gross income tax act imposing a tax upon gross receipts from commerce, could not constitutionally be applied to the gross receipts derived by an Indiana corporation from sales in other states of goods manufactured by it in Indiana.

Had the state sought to impose a tax measured by the gross receipts derived by Washington apple growers from their sales in other states and foreign countries of fruit grown in Washington, such a tax would have been void under the *Storen* decision.

But that is not the situation here. The tax is imposed, not on the Washington growers, but on such growers' agent. The tax is measured, not by the sales price of the fruit, but by the compensation paid plaintiff for its local services as agent.

The Indiana exaction was not, as here, a business tax, but a "privilege tax upon the receipt of gross income." Said the court (304 U. S. 310):

"Nor is it for the transaction of business, since in many instances it hits the receipt of income by one who conducts no business."

In condemning the offending tax, the court said further in the *Storen* case (304 U. S. 311-314):

"Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent. on every dollar received from these sales.

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Sec. 8 of the Constitution.

* * * * * * * *

"So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold, it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured, or by other permissible forms of levy upon the intrastate transaction. It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

As earlier noted, the chief objection to the Indiana tax—potential multiple taxation—is not present here. It is only plaintiff's local activities in Washington that the state is seeking to tax.

**Services of broker or agent in making interstate sales are not tax-exempt.**

It will bear repeating that here, we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by plaintiff for the Cooperative Federation.

The restrictioins on state taxation of imports from foreign nations are at least as great, if not greater than those applied to articles of interstate commerce. Thus, an importer is said to be entitled to his first sale in the original package, unrestricted by any license or other state taxes (*Brown v. Maryland*, 12 Wheat. 419; *Anglo-Chilean Nitrates Sales Corp. v. Alabama*, 288 U. S. 218, 226-7).

Yet even in the case of exports, the supreme court early recognized the distinction between sales by the owner and sales by an agent. In *Hopkins v. U. S.*, 171 U. S. 578, 595, the court thus reviewed its early ruling:

"In *Brown v. Maryland*, 12 Wheat. 419, Chief Justice Marshall, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auctioneer to do it for him, and he said that in the latter case the importer could not object to paying for such services as for any other, and that the right to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid."

In *Hopkins v. U. S.*, 171 U. S. 578, the court held activities of a commission merchant similar to those of the plaintiff here, not to constitute interstate commerce. The facts sufficiently appear from the following generous excerpts (pp. 587 *et seq.*):

"We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?

"* * * The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

* * * * * * * *

"It is urged that they are active promoters of the business of selling cattle upon consignment from their owners in other States, and that in order to secure the business the defendants send their agents into other States to the owners of the cattle to solicit the business from them; that the defendants also lend money to the cattle owners and take back mortgages upon the cattle as security for the loan; that they make advances of a portion of the purchase price of the cattle to be sold, by means of the payment of drafts drawn upon them by the shippers of the cattle in another State at the time of the shipment. All these things, it is said, constitute intercourse and traffic between the citizens of different States, and hence the by-law in question operates upon and affects commerce between the States.

* * * * * * * * *

"* * * That business is not altered in character because of the various things done by defendants for

the cattle owner in order to secure it. The competition among the defendants and others who may be engaged in it, to obtain the business, results in their sending outside the city to cattle owners, to urge them by distinct and various inducements to send their cattle to one of the defendants to sell for them. In this view it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed.

"The selling of an article at its destination, which has been sent from another State, while it is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commission based upon services performed for the owner in effecting the sale of the cattle, is not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another State. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the facilities given or provided the owner in the course of the movement from the home *situs* of the article to the place and point where it is sold."

The rule deducible from *Hopkins v. United States*, is, we submit, that even where a sale of goods by the owner would constitute interstate commerce within the protection of the commerce clause, where a sale of the same character is made by a broker or commission merchant, the services performed by the agent in connection with such sale are not to be deemed so connected with the interstate transaction as to make them a part of inter-

state commerce, and at most the effect, if any, of such services upon interstate commerce is but remote, indirect and incidental. This being true, such agent's activities are within the state's legitimate taxing power.

A non-discriminatory state tax which only indirectly or remotely burdens interstate commerce is not obnoxious to the commerce clause.

*Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 294;

*Western Cartridge Co. v. Emmerson*, 281 U. S. 511, 514;

*Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 267-8;

*Southern Gas Corp. v. Alabama*, 301 U. S. 148, 157.

It is true, of course, that in more recent cases this court, under the "flow of commerce" doctrine, has upheld federal legislation forbidding illegal combinations among purchasers of live stock at the great stock yard centers (*Swift and Co. v. U. S.*, 196 U. S. 375; *Stafford v. Wallace*, 258 U. S. 495), but in so doing, it distinguished, but did not disturb, its prior ruling in the *Hopkins* case. To quote:

"So, again, the line is distinct between this case and *Hopkins v. United States*, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. * * *" (196 U. S. 397; 258 U. S. 524.)

By way of explanation of the *Ficklen* case upon which the state court largely rests it decision, may we say

that in *Robbins v. Shelby County Taxing District*, 120 U. S. 489, it had been earlier held that a Tennessee statute imposing a license tax of $25 per month on all drummers not having a regular licensed place of business in the taxing district was violative of the commerce clause as applied to persons soliciting the sale of goods on behalf of firms doing business in another state. Three justices dissented. In the later case of *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 21, the court said as to a license tax measured by gross commissions imposed on factors and brokers buying or selling on commission, as applied to a commission merchant who negotiated sales on behalf of principals residing in other states with respect to goods located in other states:

"In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted and their property engaged therein, or their profits realized therefrom.

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

"* * * This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce." (p. 24.)

**Record fails to show that offending tax imposed on extra-territorial activities.**

One reason suggested by the state court dissenting justices for condemning the Washington business tax as applied to plaintiff was that a part of appellant's business activities were carried on through its representatives in states other than Washington. (R. 28.)

In this connection, may we call attention to the following allegation of the complaint:

"That as a part of plaintiff's business it has sales representatives in very many points outside of the State of Washington who, on behalf of the plaintiff, negotiate said sales and on approval of the plaintiff of the same execute in said points outside of the State of Washington and on behalf of the plaintiff written contracts of sale." (R.2.)

While this averment is admitted by the demurrer, there is no allegation or showing that defendants threaten the exaction of the tax with respect to any part of the business handled by those non-resident sales representatives.

The state business or occupational tax is measured by ½ of 1% of "the gross income of the business engaged in within this state." (Laws of Wash. of 1935, ch. 180, sec. 4(f).)

A deduction is allowed of,—

"Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States"; (sec. 12(f).)

Plaintiff's gross income as sales agent for the Cooperative Federation is derived from the following paragraph of the agency agreement:

"In consideration of the services to be rendered by Agency according to the provisions above set forth, Federation shall pay to Agency, and the latter is authorized to deduct from the proceeds of sales made, the following compensation, viz.:

"Apples in standard boxes, eight cents per box

"Pears in standard boxes, ten cents per box.

"Provided further that all cars sold *to which attach brokerage*, diversion demurrage, icing, storage or other charges not properly payable by the purchaser, or that in the event of cars being broken up and sold in less-carload parcels at destination; cars being exported or cars sold delivered, all transportation, icing, selling, auction, dock, carting, seaboard forwarding and other actual out-of-pocket expenses shall be first deducted from the proceeds of any such sale and no part of such expense shall be borne by Agency out of its service revenues." (R. 12.) (Emphasis supplied.)

Unquestionably plaintiff's ultra-state sales representatives are paid for their services, yet in view of the above proviso, may it not be fairly assumed that whenever such brokerage is payable by the seller, it is paid by the principal in addition to plaintiff's agreed compensation of so much per box?

But however this may be, the theory of plaintiff's complaint is that all of its activities constitute interstate commerce as to which no tax whatever may be imposed. No claim is made that defendants refuse to allow a deduction with respect to that portion of plaintiff's gross income, if any, earned outside the state.

Moreover, the vice of a state tax on an extra-territorial activity would be its contravention of the due process, and not of the commerce clause.

61 C. J., p. 160, note 82, p. 163, note 34.

Neither in its complaint nor elsewhere does plaintiff invoke the protection of the due process clause, its

only claim being that the exaction of the offending tax would offend the commerce clause and the provisions of article I, section 10, forbidding state taxation of exports. (R. 3-4.)

It is, of course, well settled that "if a federal question is raised in the state court, a party bringing the case to the supreme court of the United States cannot raise in that court another federal question not raised below."

Vol. 1, Encyc. of U. S. Sup. Crt. Rep. 632, note 19;
*Dewey v. Des Moines*, 173 U. S. 193, 198;
*Indiana Power Co. v. Elkhart Power Co.*, 187 U. S. 636;
*Cox v. Texas*, 202 U. S. 446.

Thus, three sufficient reasons suggest themselves why appellant cannot here successfully assail the offending exaction as extra-territorial taxation:

(1) There is no showing that any of plaintiff's gross income by which the tax is measured, is earned outside the state;

(2) There is no showing of a rejection by the Washington administrative officers of any claimed deduction by reason of plaintiff's extra-territorial business activities, if any;

(3) Extra-territorial taxation violates, not the commerce clause but the due process clause, a federal constitutioinal provision whose protection was not sought in the lower court.

**Solicitation of sales by plaintiff's ultra-state representatives, would not make plaintiff's own activities non-taxable interstate commerce.**

Defendants, as we have seen, assert no right to impose the challenged business tax on the activities of plain-

tiff's outside representatives in making, or assisting in making fruit sales. Plaintiff's own business is taxable only by the state where conducted. Likewise, its agents' business is taxable only by the state wherein performed. Neither's activities are interstate, merely because involving interstate shipments of commodities.

Nor does the mere solicitation of sales by these outside representatives, transform plaintiff's activities into tax-free interstate commerce. In *Hopkins v. U. S.*, 171 U. S. 578, 601, the court said with respect to the effect of a commission merchant's agents soliciting orders in other states:

"We do not think it can be properly said that the agents of the defendants whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale are thereby themselves engaged in interstate commerce. They are simply soliciting the various stock owners to consign the stock owned by them to particular defendants at Kansas City, and until the arrival of the stock at that point and the delivery by the transportation company no duties of an interstate commerce nature arise to be performed by the defendants. As the business they do is not interstate commerce, the business of their agents in soliciting others to give them such business is not itself interstate commerce."

It could hardly be said that the solicitation of sales in other states through the medium of local sales-representatives would amount to interstate commerce any more than advertising the merits of the products handled by plaintiff through the medium of newspaper advertising; yet in *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S. 436, it was held that a business conducted by an advertising agency of placing, by contracts with publishers, advertisements for manufacturers and merchants, in 'maga-

zines, which were published and distributed through the United States, was not interstate commerce.

And compare *Western Live Stock v. Bureau of Revenue* (303 U. S. 250), *supra*.

Assuming for the sake of argument that sales of fruit for ultra-state delivery, if made directly by plaintiff's principals, would be immune from unapportioned state taxation, yet we insist that where such principals chose to make such sales through the medium of an independent contractor, the latter's activities in Washington in making and promoting such sales are subject to state taxation like any other local business.

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For the reasons urged, we respectfully submit that the judgment of the state supreme court should be affirmed.

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Attorneys for Appellees.

# SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1938.

Gwin, White & Prince, Inc., Appellant,
vs.
Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State of Washington Tax Commission.

Appeal from the Supreme Court of the State of Washington.

[January 3, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal raises the single question whether a Washington tax measured by the gross receipts of appellant from its business of marketing fruit shipped from Washington to the places of sale in various states and in foreign countries is a burden on interstate and foreign commerce prohibited by the commerce clause of the Federal Constitution.

Appellant, a Washington corporation licensed to do business there, brought this suit in the state Superior Court to restrain appellees, comprising the State Tax Commission, from collecting the "business activities" tax laid by Chapter 180 of Washington Laws of 1935, amending Chapter 191 of Washington Laws of 1933, on the ground that it infringes the commerce clause. By stipulation after demurrer to the bill of complaint the cause was tried and decided on the merits, upon facts stated in the complaint and certain others specified in the stipulation. Judgment of the trial court for appellees was affirmed by the Supreme Court of Washington, 193 Wash. 451, and the case comes here on appeal under § 237(a) of the Judicial Code as amended, 28 U. S. C. § 344.

Sections 4(e), 5(g), (m) of Tit. II, c. 180 of Washington Laws of 1935 lay "a tax for the act or privilege of engaging in business activities" upon every person (including corporations) "engaging within this state in any business activity," with exceptions not now material, at the rate of one-half of 1% of the "gross income of the business." As the record discloses, appellant has a place of business in the state of Washington from which it carries on its operations in

marketing, in other states and foreign countries, apples and pears grown in Washington and Oregon. Its entire business is that of marketing agent for fruit growers and growers' cooperative organizations in those states. As such it makes sales and deliveries of the fruit in other states and in foreign countries, collects the sales prices and remits the proceeds to its principals after deducting transportation charges, certain expense allowances and its own compensation. In the course of the business the fruit is shipped from the states of origin—approximately 25% from Oregon—to other states and foreign countries, sometimes directly to the purchasers, but more often it is consigned to appellant at extra-state points from which it is diverted by appellant to purchasers who buy the fruit while in transit, or where it is stored pending sale. Representatives of appellant at numerous points without the state negotiate sales of the fruit on behalf of appellant and on its approval execute written contracts of sale, effect delivery of the shipments to purchasers, collect the purchase price and remit it to appellant in Washington, where it is accounted for to the shippers. In conducting the business appellant sends to its representatives without the state daily bulletins listing the fruit, some of which is in transit interstate and some of which has already been placed in storage without the state, and it expends large amounts for communications by telephone, telegraph and cable between itself in Washington and its representatives outside the state.

The entire Washington business is carried on by appellant under contract with an incorporated federation of twelve state cooperative growers' organizations. By this contract appellant is given exclusive authority to sell all apples and pears coming into the possession and control of the federation as agent for its members and to collect the proceeds of sale. Appellant undertakes to sell these products at prices fixed by the federation, to obtain their widest possible distribution, to attend to all traffic matters pertaining to shipment and transportation of the fruit, to effect delivery to purchasers and to collect and remit the sales prices. The stipulated compensation for the entire service is at the rate of 8 cents a box for apples sold and 10 cents a box for pears. According to the bill of complaint appellees assert that appellant is subject to the tax upon its entire gross revenue from the business, and they threaten to collect the tax and to impose penalties for its nonpayment. But on the trial it was stipulated that "the state makes

no claim" to the tax upon appellant's Oregon business, and we treat the decision and decree of the state court as concerned only with the validity of the tax measured by the amount of fruit shipped from Washington.

The Supreme Court of Washington, conceding that the shipment of the fruit from the state of origin to points outside, and its sale there, involve interstate commerce, held nevertheless that appellant's activities in Washington in promoting the commerce were a local business, subject to state taxation as is other business carried on in the state, and it sustained the present levy, against attack under the commerce clause, as a tax upon those activities, citing *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, and *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459.

We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Real Silk Mills* v. *Portland*, 268 U. S. 325; and the only question is whether the taxation of appellant's gross receipts derived from them is such an interference with interstate commerce as to bring the tax within the constitutional prohibition.

While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume.

The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307; cf. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604.

It has often been recognized that "even interstate business must pay its way" by bearing its share of local tax burdens, *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259, and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, 254 *et seq.*, and cases cited. But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state, see *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U. S. 379; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; cf. *Ficklen* v. *Shelby County Taxing District*, *supra*; *American Manufacturing Co.* v. *St. Louis*, *supra*, burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.

Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate

commerce is being done, the risk of a multiple burden to which local commerce is not exposed. *Adams Manufacturing Co.* v. *Storen, supra,* 310, 311; cf. *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. and S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 225, 227; *Meyer* v. *Wells Fargo & Co.,* 223 U. S. 298; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Fisher's Blend Station* v. *State Tax Commission,* 297 U. S. 650; see *Western Live Stock* v. *Bureau of Revenue, supra,* 260. Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden.

*Ficklen* v. *Shelby County Taxing District, supra,* which the Washington Supreme Court thought sustained its decision, upheld a state license tax imposed upon the privilege of doing a brokerage business within the state and measured by the gross receipts of commissions from sales of merchandise shipped into the state for delivery after the sales were made. Although the tax, measured by gross receipts, to some extent burdened the commerce, it was held that the burden did not infringe the commerce clause. Since it was apportioned exactly to the activities taxed, all of which were intrastate, the tax was fairly measured by the value of the local privilege or franchise. *N. Y., L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; *American Manufacturing Co.* v. *St. Louis, supra; Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co., supra.* Neither the tax in the *Ficklen* case nor that upheld in *American Manufacturing Co.* v. *St. Louis, supra,* was open to the objection directed here to the present tax and sustained in *Adams Manufacturing Co.* v. *Storen, supra,* 311, that the tax is measured by gross receipts from activities in interstate commerce conducted both within and without the taxing state and that the exaction is of such a character that if lawful it might be laid to the fullest extent by the states in which the merchandise is sold as well as by those from which it is shipped. See *Western Live Stock* v. *Bureau of Revenue, supra,* 260.

For more than a century, since *Brown* v. *Maryland,* 12 Wheat. 419, 445, it has been recognized that under the commerce clause,

Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Robbins* v. *Shelby County Taxing District*, *supra*; *Leloup* v. *Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 289; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Fisher's Blend Station* v. *State Tax Commission*, *supra*; *Adams Manufacturing Co.* v. *Storen*, *supra*. For half a century, following the decision in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, 254, *et seq.*, and cases cited.

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1938.

Gwin, White & Prince, Inc., Appellant,
vs
Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State of Washington Tax Commission.
} Appeal from the Supreme Court of the State of Washington.

[January 3, 1939.]

Mr. Justice Butler.

Mr. Justice McReynolds and I concur in the result.

Appellant is engaged exclusively in interstate commerce, a part of which is carried on in the State of Washington. For the privilege of doing that business the state statute purports to tax its gross earnings at the rate of one-half of one per cent. The exaction is plainly repugnant to the commerce clause. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326. *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 298, 300. *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 300. *New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338, 346. *Fisher's Blend Station* v. *Tax Comm'n*, 297 U. S. 650, 655-656. *Puget Sound Co.* v. *Tax Comm'n*, 302 U. S. 90, 94. See *Matson Nav. Co.* v. *State Board*, 297 U. S. 441, 444. Reversal appropriately may be based on citation of these decisions without more.

# SUPREME COURT OF THE UNITED STATES.

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vs.
Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State of Washington Tax Commission.

Appeal from the Supreme Court of the State of Washington.

[January 3, 1939.]

Mr. Justice BLACK, dissenting.

"Equality is the theme that runs through all the sections of the statute"[1] of the State of Washington here considered. The statute imposes a general, non-discriminatory tax—measured by gross receipts—upon all businesses operating in that State. The intended equality of the statute will become unequality by the judgment of this Court here, because appellant and all other businesses in Washington that receive income for selling Washington products in that and other States, are exempted from the tax. Appellant is exempted from past, present and future payments of this tax. Not so, however, as to past, present, or future payments by Washington businesses selling only to citizens of that State. They must bear the entire burden of the tax. Thus the judgment here, framed to prevent conjectured future, possible—not present and actual—discrimination against interstate commerce, makes of this statute with equality as its theme, an instrument of discrimination against Washington intra-state businesses. Appellant, a Washington agent or broker selling Washington products in that State and elsewhere, can now do so freed from this business tax. Washington agents and brokers selling the same products to Washington citizens (and all other local businesses) must pay. Washington's intra-state commerce thus will "pay its way,"[2] interstate commerce need not.

In 1933, Washington's system of taxation failed to supply adequate revenue to support activities essential to the welfare of its people. Mounting delinquencies due to burdensome taxes on prop-

[1] Henneford v. Silas Mason Co., 300 U. S. 577, 583.
[2] Cf. Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252, 259.

erty led the State legislature to conclude that property taxes had to be reduced. This reduction was made. Then, forced to seek new sources of revenue,[3] the State turned—as did many other States faced with similar needs[4]—to a general, non-discriminatory excise tax upon business carried on in Washington, measured by gross receipts. This general and non-discriminatory tax enabled "the common schools of the state . . . to operate the full school term."[5] While those engaged in interstate businesses have enjoyed the property tax reduction in common with all Washington businesses, the exemption from taxation here granted appellant forces intra-state businesses to bear the entire burden of the excise that replaced the repealed property taxes.[6] Only intra-state business is required to contribute under this excise to the support of the State government that affords protection to both interstate and local business.[7]

Appellant, a Washington corporation, serves—under a contract made in Washington—as sales agent for Washington apple growers. Its agents sell these Washington-grown apples in Washington and other States. The Washington excise tax is measured by appellant's gross income—received in Washington—and earned solely by selling apples grown in and shipped from that State.[8]

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[3] Fifth Biennial Report, Tax Commission of Washington; "The Sales Tax in the American States," Haig & Shoup (1934), p. 309 *et seq.*

[4] At least eleven States—most of them recently—have imposed gross income or gross sales taxes upon the privilege of doing business within their respective borders. See, "Tax Systems of the World," 7th Ed. (CCH), pp. 153 to 156. While these laws vary in application, several may be generally characterized as similar to the Washington tax. See, "State Law Index" No. 5, p. 673 (Legislative Reference Service, Library of Congress); Fifth Biennial Report, *supra*; dissent, Adams Manufacturing Co. v. Storen, 304 U. S. 307, 317, Footnote 4.

[5] Fifth Biennial Report, *supra*, p. 8.

[6] Cf. Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453, 454; United States Express Co. v. Minnesota, 223 U. S. 335, 345, 347.

[7] Woodruff v. Parham, 8 Wall. 123, 137.

[8] While about 25% of appellant's business relates to the sale of Oregon-grown apples, the State of Washington made no contention that it could under its statute impose a tax upon appellant's receipts from the sale of Oregon-grown apples. The judgment of the State court from which appeal was taken expressly states: "the court . . . considered . . . the stipulation between the parties that the State makes no claim to the tax upon the Oregon business of . . . [appellant] even though it clears through . . . [appellant's] Seattle office," and was "of the opinion that the business of . . . [appellant], *originating in the State of Washington is taxable.*" (Italics supplied.) In affirming this judgment the Supreme Court of Washington pointed out that appellant was denying "the state tax commission's claim of a tax liability on the total commission appellant receives *from the growers for Washington-grown food sold and shipped to parts within and without this State* . . ." (Italics supplied.)

No other State in which appellant's agents perform sales services has imposed a similar tax upon appellant measured by any part of its gross receipts. Such an eventuality—if it should occur—is given the title of "multiple taxation." And such conjectured "multiple taxation" would be—it is said—a violation of that Clause of the Constitution which gives Congress power to regulate commerce among the States. Thus far, Congress has not deemed it necessary to prohibit the States from levying taxes measured by gross receipts from interstate commerce. While there are strong logical grounds upon which this Court has based its invalidation of State laws actually imposing unjust, unfair, and discriminatory burdens against interstate commerce as such,[9] the same grounds do not support a judicial regulation designed to protect commerce from validly enacted non-discriminatory State taxes which do not—but may sometime—prove burdensome. With reference to the possible invalidity of another phase of this same Washington tax program by reason of conjectured future taxes of other States, this Court has said:[10]

"A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."

So here, if national regulation to prevent "multiple taxation" is within the constitutional power of this Court, it would seem to be time enough to consider it when appellant or some other taxpayer is actually subjected to "multiple taxation."

Unless we presuppose that the conjectured tax on appellant's gross income by another State would be valid, appellant has not even shown a hypothetical possibility of injury. Certainly, Washington's law, enjoying a strong presumption of constitutionality, would not be invalidated because of apprehension that another State might lay a tax on appellant's income which is invalid and unenforceable. Any other State's tax on appellant which directly discriminates against interstate commerce, could not (together with

[9] Welton *v.* State of Mo., 91 U. S. 275; Walling *v.* Mich., 116 U. S. 446; Darnell & Son *v.* Memphis, 208 U. S. 113; cf. Phila. Steamship Co. *v.* Penn., 122 U. S. 326, 342, 344-5.

[10] Henneford *v.* Silas Mason Co., *supra*, at 587.

Washington's tax) create a "multiple burden." This is so, because such a discriminatory tax law, standing alone, would be held to violate the Commerce Clause.[11] Every State has the right to utilize gross receipts as the measure of taxes which it has the power to impose.[12] Washington—it is admitted—had the power to tax appellant save for the possibility of "multiple taxation." Since "multiple taxation" can only result if another State passes a valid, non-discriminatory tax law, two non-discriminatory State laws when combined become invalid and discriminatory under the Commerce Clause, as a result of the judgment here. This is the consequence of departing from the sound position that State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress.

Appellant is here specifically exempted from Washington's non-discriminatory "tax for the act or privilege of engaging in business activities" in Washington because of conjectured similar taxation of appellant in other States. However, the principles announced in the first three cases relied on by the majority[13] would constitute authority for exempting appellant's agents from a tax on the privilege of engaging in the business of selling and delivering apples "in other States to which [appellant's] commerce extends." These principles were there applied by this Court to invalidate taxes on the privilege of negotiating interstate sales, levied by States in which the purchasers resided. In one of the cases (*Caldwell v. North Carolina*, decided in 1903), this Court observed (pp. 632-3) "that efforts to control commerce of this kind, in the interest of the State *where the purchaser resided*, have been frequently made in the form of statutes and municipal ordinances, but . . . such efforts have been heretofore rendered fruitless by the supervising action of this court." (Italics supplied.) The reasoning of these three cases, however, does not support the judgment here which invalidates a privilege tax levied, not by the State where the apples were purchased, but by the State where the apples were grown, where the appellant does business, and to which all proceeds from

[11] See Note 9, *supra*; cf. Sonneborn Bros. v. Cureton, 262 U. S. 506, 516; Pacific C. v. Johnson, 285 U. S. 480, 493.

[12] Rapid Transit Corp. v. New York, 303 U. S. 573, 582.

[13] Robbins v. Shelby County Taxing District, 120 U. S. 489; Caldwell v. North Carolina, 187 U. S. 622; Real Silk Mills v. Portland, 268 U. S. 325.

sales made by appellant are remitted. This is especially true since the three earlier decisions assumed that a privilege tax imposed by an interstate business's State of residence (such as this Washington tax on appellant) would be valid. In *Robbins* v. *Shelby County Taxing District, supra,* at page 498, the Court—in explaining that the levy by the State of purchase of a tax on the privilege of selling would discriminate against out of State businesses—said: "[It is presumable, . . . [that] the merchants and manufacturers of other States in the places where they reside" are taxed for their licensed businesses there. In showing that "the tax . . . [was] discriminative against the merchants and manufacturers of other states" the Court also stated that "[. . .] it not only operates as a restriction upon interstate commerce, but . . . it is intended to have that effect as one of its principal objects." Appellant's business is exempted here from a privilege tax in its State of residence, and approval is given authorities exempting such business from privilege taxes in other States where appellant's activities are carried on. Thus, these three cases stand between appellant and conjectured "multiple taxation" in other States where its agents sell apples. The exemption of interstate business from the type of State taxation here involved is now made complete.

A business engaging in activities in two or more States should bear its part of the tax burdens of each. If valid, non-discriminatory taxes imposed in these States create "multiple" burdens, such "burdens" result from the political subdivisions created by our form of government. They are the price paid for governmental protection and maintenance in all States where the taxpayer does business. A State's taxes are not discriminatory if the State treats those engaged in interstate and intra-state business with equality and justice. If the combined valid and non-discriminatory taxes of many States raise a problem, only Congress has power to consider that problem and to regulate with respect to it. Neither a State, nor a State with the approval of this Court, has the constitutional power to enact rules to adjust and govern conflicting State interests in interstate commerce.

Legislative inquiry might disclose to Congress that the speculative danger of injury to interstate commerce is more than offset by the certain injury to result from depriving States of a practical method of taxation. It might appear to Congress that the adoption of a rule against State taxes measured by interstate commerce

gross receipts would deprive the States of a potent weapon useful in preventing evasion of State taxes.

This Court's rule would permit Washington to tax appellant's net income. But determination and collection of taxes on net incomes are often very difficult because corporate profits and income may be isolated or hidden by accounting methods, holding companies and intercorporate dealings. A substantial portion of the nation's commerce is carried on by corporations with far-flung business activities in many States. Inter-corporate relations may assume "their rather cumbersome and involved nature for the purpose of evading [a State] . . . tax" on income and to "remove income from the state though still creating it within the state."[14] Even "profits themselves are not susceptible of ascertainment with certainty and precision except as a result of inquiries too minute to be practicable."[15]

Congress might conclude that the States should not be prohibited from utilizing non-discriminatory gross receipts taxes for State revenues, because there are "justifications for the gross receipts tax. . . . it has greater certitude and facility of administration than the net income tax, an important consideration to taxpayer and tax gatherer alike. And the volume of transactions indicated on the taxpayer's books may bear a closer relation to the cost of governmental supervision and protection than the annual profit and loss statement."[16]

Only a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make—can indicate the need for, as well as justify, restricting the taxing power of a State so as to provide against conjectured taxation by more than one State on identical income. A broad and deliberate legislative investigation—which no Court can make—may indicate to Congress that a wise policy for the national economy demands that each State in which an interstate business operates be

[14] Palmolive Co. *v.* Conway, 43 F. (2d) 226, 230, cert. den., 287 U. S. 601; see, Magill "Allocation of Income by Corporate Contract," 44 Harvard Law Review 935; "Interstate Allocation of Corporate Income for Taxing Purposes" (note) XL Yale Law Review 1273; Huston "Allocation of Corporate Net Income for Purposes of Taxation," XXVI Ill. Law Review 725; Breckenridge, "Tax Escape by Manipulations of Holding Company," 9 No. Car. Law Review 189; Perle and Means, "The Modern Corporation and Private Property" (1934), p. 202 *et seq.*

[15] Cardozo, J., dissenting, Stewart Dry Goods Co. *v.* Lewis, 294 U. S. 550, 576.

[16] Rapid Transit Corporation *v.* New York, *supra*, 582-3.

permitted to apply a non-discriminatory tax to the gross receipts of that business either because of its size and volume or partially to offset the tendency toward centralization of the nation's business.[17] Congress may find that to shelter interstate commerce in a tax exempt refuge—in the manner of the judgment here—is to grant that commerce a privileged status over intra-state business, contrary to the national welfare.

It is indicated, however, that Washington might have validly apportioned its fair share of appellant's gross income for taxation. To say that a single State can—subject to supervision and approval by this Court—enact regulations apportioning its share of the taxable income from interstate commerce, is to transfer the constitutional power to regulate such commerce from Congress to the States and Federal courts to which the Constitution gives no such power. The Constitution contemplates that Congress alone shall provide for necessary national uniformity in rules governing foreign and interstate commerce.[18] Rules to further free trade among the States by apportionment or division of taxes on such commerce, are regulations. Both the necessity for such a rule, and the determination and enactment of a regulation to put it into effect, call for facilities and powers possessed neither by a State nor by the courts. A State legislature attempting to put upon interstate business its apportioned share of the burden of taxation is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within" the borders of the State.[19] If an "apportionment" between States of taxes on interstate business is to be made, it cannot be accomplished without national inquiry and national action.

While some formulas for apportionment devised by States have been approved by this Court,[20] others have been invalidated.[21] A

[17] Cf. Brandeis, J., dissenting, *Liggett Co. v. Lee*, 288 U. S. 517, 574: "Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business . . . It was said in *United States v. U. S. Steel Corp.*, 251 U. S. 417, 451, that the Sherman Anti-Trust Act did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned."

[18] Welton *v.* State of Mo., *supra*, 279, 280.

[19] Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 121.

[20] Underwood Typewriter Co. *v.* Chamberlain, *supra*; Bass, Etc., Ltd. *v.* Tax Comm., 266 U. S. 271; cf. Nat'l Leather Co. *v.* Mass., 277 U. S. 413.

[21] Hans Rees' Sons *v.* No. Car., 283 U. S. 123; cf. Wallace *v.* Hines, 253 U. S. 66; Alpha Cement Co. *v.* Mass., 268 U. S. 203.

formula applied by Connecticut was held valid,[22] but a similar formula was held invalid when adopted in North Carolina.[23] The litigation which has followed in the wake of State attempts at apportionment has confirmed, in the opinion of many, the wisdom of the Founders in denying to the States and courts, and granting to the Congress, exclusive power over interstate commerce. Departures from this principle have, as here, left intra-state businesses—usually comparatively small—to bear the entire burden of taxes invalidated as to interstate businesses, while interstate businesses—usually conducted on a large scale—have been exempted. Should Washington attempt an apportionment, the fate of its formula would be uncertain until this Court passes upon its fairness. A state's inability to obtain necessary data and information as a basis of a formula for apportionment between itself and the other forty-seven States, indicates in advance that its apportionment might be invalidated. When State statutes of apportionment come here this Court is unable to make the broad national inquiry necessary to reach an informed conclusion on this question of economic policy.

But Congress has both the facilities for acquiring the necessary data, and the constitutional power to act upon it. "The power over commerce . . . . was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it."[24] The "disastrous experiences under the Confederation when the states vied in discriminatory measures against each other"[25] united the Constitutional Convention in the conviction that some branch of the Federal government should have exclusive power to regulate commerce among the States and with foreign nations. Our Constitution adopted by that Convention divided the powers of government between three departments, Congress, the Executive and the Judiciary. It allotted to Congress alone the "Power . . . to regulate Commerce with foreign Nations, and among the several states, . . ." Congress

[22] Underwood case, *supra.*

[23] Rees' case, *supra.*

[24] Gibbons v. Ogden, 9 Wheat. 1, 190.

[25] The Minnesota Rate Cases, 230 U. S. 352, 398. See also, Houston & Texas Ry. v. United States, (The Shreveport Case), 234 U. S. 342, 350. "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation. . . ." Railroad Co. v. Richmond, 19 Wall. 584, 589. See also, County of Mobile v. Kimball, 102 U. S. 691, 697.

is the only department of our government — State or Federal — vested with authority to determine whether "multiple taxation" is injurious to the national economy; whether national regulations for division of tax measured by interstate commerce gross receipts should or should not be adopted; and what regulations, if any, should protect interstate commerce from "multiple taxation." It "is the function of this Court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."[26]

Until 1936,[27] this Court had never stricken down — as violating the Commerce Clause — a uniform and non-discriminatory State privilege tax measured by gross receipts, and constituting an integral element of a comprehensive State tax program. In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, decided half a century ago and relied upon to support the judgment here, this Court did not determine that such a general business tax—applied to all businesses within a State—could not be measured by interstate commerce gross receipts. On the contrary, the Court pointed out that the invalidated tax was "a tax on transportation only" (p. 345), and that even one engaged in transportation could "like any other citizen, . . . . be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment." That, as the Court made clear, was "an entirely different thing from laying a special tax upon his receipts in a particular employment." (p. 342) Since the *Philadelphia Steamship Co.* case, this Court has sustained many State taxes measured by receipts both from interstate and intra-state commerce.[28] It was not until the decisions in the cases of *Crew Levick Co.* v. *Pa.*, 245 U. S. 292, 296, and *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 329, decided 1917 and 1918, respectively, that this Court first

[26] The Minnesota Rate Cases, *supra*, 433.

[27] Fisher's Blend Station *v.* Tax Com'n., 297 U. S. 650, see Adams Manufacturing Co. *v.* Storen, 304 U. S. 307.

[28] See notes 17, 18 and 19, dissent, Adams Manufacturing Co. *v.* Storen, *supra*, p. 329.

tentatively announced, by way of dicta, a rule condemning State taxes based on gross receipts from interstate commerce. The full-blown rule under which the Federal courts strike down generally applied non-discriminatory State taxes measured by gross receipts from interstate commerce ripened into its present expanded form only eight months ago (*Adams Manufacturing Co.* v. *Storen*, May 16, 1938). This recent judicial restriction—still less than a year old—on the power of the States to levy general gross receipts taxes, cannot be justified or validated by claiming prestige from advanced age.

Since the Constitution grants sole and exclusive power to Congress to regulate commerce among the States, repeated assumption of this power by the courts—even over a long period of years—could not make this assumption of power constitutional. April 25, 1938, this Court overruled and renounced an unconstitutional assumption of power by the Federal courts based on a doctrine extending back through an unbroken line of authority to 1842.[29] In overruling, it was said: "We merely declare that in applying the doctrine [declared unconstitutional] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." (at page 80.) A century old rule had produced "injustice and confusion" and "the unconstitutionality of the course pursued . . . [had become] clear . . . ." (pp. 77, 78.) That decision rested upon the sound principle that the rule of stare decisis cannot confer powers upon the courts which the inexorable command of the Constitution says they shall not have. State obedience to an unconstitutional assumption of power by the judicial branch of government, and inaction by the Congress, cannot amend the Constitution by creating and establishing a new "feature of our constitutional system." No provision of the Constitution authorizes its amendment in this manner.

It is as essential today, as at the time of the adoption of the Constitution, that commerce among the States and with foreign nations be left free from discriminatory and retaliatory burdens imposed by the States. It is of equal importance, however, that the judicial department of our government scrupulously observe its constitutional limitations and that Congress alone should adopt a broad national policy of regulation—if otherwise valid State laws combine to

[29] Erie R. Co. v. Tompkins, 304 U. S. 64.

hamper the free flow of commerce. Doubtless, much confusion would be avoided if the courts would refrain from restricting the enforcement of valid, non-discriminatory State tax laws. Any belief that Congress has failed to take cognizance of the problems of conjectured "multiple taxation" or "apportionment" by exerting its exclusive power over interstate commerce, is an inadequate reason for the judicial branch of government—without constitutional power—to attempt to perform the duty constitutionally reposed in Congress. I would return to the rule that—except for State acts designed to impose discriminatory burdens on interstate commerce because it *is* interstate—Congress alone must "determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."[30]

For these and other reasons set out elsewhere[31] I believe the judgment of the Supreme Court of Washington should be affirmed.

[30] Welton *v.* State of Mo., *supra*, 280.

[31] See dissent, Adams Mfg. Co. *v.* Storen, 304 U. S. 307, 316.